in New York Harbor. Neither under the law of nations nor of local law is authority cited which impels a holding that such 'constructive possession' is the equivalent of physical possession. So far as can be ascertained, certainly in none of the classic cases decided either in the United States or in England, has such an issue been determined" (Opinion District Court, R. 168-172).

"The steamship 'Navemar' was not an armed vessel, was not a vessel in the public service of the Republic of Spain, was not possessed by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer." (R. 173, 174).

There is ample and uncontradicted evidence to sustain each of the Court's foregoing findings of fact. It therefore seems unnecessary to burden the Court with a detailed statement of the evidence.

It is significant that the Circuit Court of Appeals dealt with the case on the footing of the possession claimed being merely a constructive possession (R. 231, 232). It is true that the Circuit Court of Appeals referred to four items of proof "as evidence of possession and control" (R. 232), but it made no finding contrary to that of the District Court on this point, and discussed the legal phases of the case as if there were a constructive possession only of the vessel by the Spanish Government. If the Court had considered that there was an actual physical possession of the "Navemar" by any officer of the Republic of Spain, it is difficult to understand why the Circuit Court of Appeals devoted so much of its opinion to the legal question as to whether or not constructive possession was sufficient to give immunity. The Circuit Court of Appeals and the District Court had before them the letter of the master which is set forth at length in the brief of the respondent here. If that letter constituted proof of actual possession of the "Navemar" by the Republic of Spain,

respondent would have made that contention below. On the contrary, as we have shown above, respondent never made that contention, but conceded that the most for which he could and did contend, was a constructive possession (R. 172). Indeed, in view of the following positive statement contained in the affidavit made by Martinez, it is readily understood why respondent could not, and did not, make the contention that there was any actual possession taken by the Spanish Consul General:

> "Neither the Spanish Consul at Rosario nor the Spanish Consul General at Buenos Aires ever took possession of the 'Navemar' or informed me that they wished to take possession or had any instructions to do so." (R. 139).

The master was at all times in the employ of the petitioner here, and even though he should say that he was holding possession of the vessel for someone else, such a statement would be without effect, because he was a servant of the petitioner, who paid his wages, and any possession which he had was necessarily the possession of the petitioner, and he, of course, had no legal authority to give away or transfer the vessel to anyone else. *The Jupiter No. 3* (1927), P. 122, at p. 135; *The Yarkand,* 120 Fed. 887, at p. 891 (C. C. A. 5).

When all the facts are considered, it becomes apparent that the respondent was well advised when he said that the possession of the Republic of Spain was at most a constructive possession. Captain Martinez testified at the trial (R. 23), that the Spanish Consul General at Buenos Aires, when questioned why he had endorsed the register, stated "That he didn't know anything, he had no news at all about anything".

Also, when the "Navemar" reached New York, and the master presented himself to the charterers, he followed the usual procedure of a privately-owned commercial vessel which enters the port of New York (R. 24).

After arriving at New York, the master reported to the owners of the vessel, the petitioner here (R. 25). The Court, however, declined to permit the master to testify as to what the owners, the petitioner here, did on receiving the report (R. 25).

Mr. Garcia, one of the owners, testified that Compania Espanola de Navegacion Maritima, S. A. was the registered owner of the "Navemar" and that the vessel was registered at Seville, Spain, which was the home port of the vessel; that all of the stock of the corporation, the petitioner here, was owned by himself and Mr. Manuel Diaz, both of whom had been residents of New York for about thirty years (R. 66), and that the active management of the petitioner was "being carried on" in New York (R. 77). Mr. Garcia also testified that all of the persons on board the "Navemar" were in the employ of the petitioner, and that none of them had ever been discharged by the petitioner nor had any of them asked to be discharged from their contract with the petitioner (R. 78). Moreover, the wages of all the crew throughout the period in controversy were paid by petitioner (R. 223-225). The $300 advanced to the master was not for the purpose of paying wages which were due, but for the purpose of reimbursing the master for advances he had made to the crew (R. 151).

Mr. Goyeneche, the ship's steward, stated (R. 158, 159) that Mr. Careaga declined to pay for any of the provisions for any of the men on the "Navemar" and that he was told by the Consul that he should go over to Messrs. Garcia & Diaz and claim for the provisions. He went to Messrs. Garcia & Diaz and presented the claim for victuals and supplies, and Messrs. Garcia & Diaz paid the claim in full (R. 160, 161). The steward stated that he alone received any provisions for any of the crew (R. 160). It also appears that the petitioner gave the men tickets to return to Spain (R. 223, 224).

A serious error appears in respondent's brief at page 5, in which a material part of a sentence is left out in the quotation, and he further mistakenly says that the ship's manifest printed in the record before the Circuit Court of Appeals is not reprinted in the record in this court.

At page 5 of his brief, respondent has fallen into a serious error. After making an incomplete quotation of a sentence

from the manifest, respondent says that the manifest, which was printed at pages 236, 237 and 238 of the record before the Circuit Court of Appeals, is not reprinted in the record before this Court (Respondent's Brief, p. 5). If the respondent had examined the print of the record in this Court, respondent would have observed that pages 236, 237 and 238 of the record in the Circuit Court of Appeals are reproduced in the print before this Court (see pp. 154A, 154B, 154C of the record before this Court). Respondent would have further observed that the words quoted by him are incomplete in that he has omitted the words which we italicize, and that the full quotation is "owned as set forth in the Register *granted at Serilla*". A reference to the testimony of Mr. Garcia (R. 66) and to the register itself, shows that "the owner of the vessel in the register *granted at Serilla*" (Italics ours) was Compania Espanola de Navegacion Maritima, S. A., the petitioner here (R. 66). (Respondent makes the same mistake at p. 30 of his brief.) So far as the manifest is concerned, the ownership it establishes, is that the petitioner was the owner of the "Navemar".

There were no proceedings before the Spanish Consul.

Under the caption "Proceedings in the Courts Below", reference is made to an alleged submission of the case to the Spanish Consul. The record may be searched in vain for any evidence of a submission of the case to the Spanish Consul. The Spanish Consul entered no order of any kind. All that occurred was that "The Master reported the activities of the committee to the Consul and was told that they met with his approval" (R. 228). No suggestion has ever been made until the brief in this Court was filed, that this report constituted a proceeding. The Consul does say that Thomas Pasqual was appointed by him to take command of the "Navemar", but Pasqual was never on board the "Navemar" (R. 160) and never presented any credentials or attempted to take possession, and never appeared as a witness or filed any affidavit or document. Indeed, except for short visits of a Mr. Celestino Diaz (who had no official position—R. 164), there

had been "nobody on board the 'Navemar' excepting the members of the crew who were in the service of the owner Compania Espanola de Navegacion Maritima, S. A. under shipping articles or employment contract which will not expire until her arrival at Barcelona, and excepting the Deputy United States Marshals of the Brooklyn Federal Court" (R. 160).

The treaty referred to in respondent's brief has nothing to do with the issues here. Moreover, as respondent did not file a cross-petition for certiorari this Court has no occasion to consider any question concerning the treaty.

Under Point I of respondent's brief, it is argued that the courts of the United States did not have jurisdiction because of the provisions of Article 21 of the Treaty of Friendship and General Relations between the United States and Spain. Both courts below held that this Treaty had nothing to do with the issues presented by this case (The District Court, R. 174; The Circuit Court of Appeals, R. 230). While the case was pending in the Circuit Court of Appeals, an application was made by Luis Careaga, Acting Consul General for Spain, for leave to appeal from the final decree of the District Court (R. 212), and in support of that application respondent filed an affidavit of Mr. Hagen (R. 213-215), in which the provisions of the Treaty referred to under Point I of respondent's brief are discussed (R. 214, 215). Petitioner filed an affidavit in reply (R. 218) in which it was pointed out that the application for an appeal was made on behalf of an officer who was not a party to the proceeding, and who had not established his right to appear: *Ex parte Cutting*, 94 U. S. 14, at pages 20 to 22; *Guion* v. *Liverpool, London, and Globe Insurance Co.*, 109 U. S. 173; that the Treaty dealt only with disputes between the master, officers and crew, and that there had been no such dispute here, the dispute being between the owner and the crew; that the trial minutes did not support Mr. Hagen's allegations that the District Court had been inconsiderate of Mr. Careaga (R. 220); all that the District Court had done, was to insist

that an appearance be entered and a proper notice of appearance be filed with the Clerk (R. 14, 220); no appearance was ever filed with the Clerk (R. 221), nor was any appearance ever submitted to the Court (R. 221), nor was any exception ever taken to any ruling of the trial court (R. 221). On this state of the record, the Circuit Court of Appeals properly denied the motion to appeal (R. 225). No cross-petition for *certiorari* has been filed in this court with respect to any ruling of either of the courts below. In *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, this Court, speaking through Mr. Justice Brandeis said (at p. 58):

> "We have no occasion to consider this alleged error in the decree as the receiver did not file a cross-petition for certiorari. Compare *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 66; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 331."

See also *Alexander* v. *Cosden Co.*, 290 U. S. 484, at p. 487, and *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, at p. 331, where this Court, speaking through Mr. Justice Stone, in a case where the Collector of Customs of the United States was respondent, said:

> "As certiorari was granted, 286 U. S. 539, on petition of the steamship company alone, only so much of the judgment below as decided in favor of the Collector is brought before us for review."

Therefore, we submit that the argument which runs through the respondent's brief, that there was error below because the courts below failed to deal with the Treaty, is not properly before this Court. Moreover, an examination of the Treaty itself shows, as was found by both courts below, that it has nothing whatever to do with the issues raised by this case. The Treaty relates solely to differences between the Captain, officers and crew, and expressly excepts disorders of a nature likely to cause a breach of the peace. The controversy between the petitioner and the mutinous crew here, was a dispute between the owners and the crew and related to a disorder likely to cause a breach of the peace (R. 68, 69, 75).

The other matters discussed under Point I of respondent's brief have been fully dealt with in our principal brief.

Point II of respondent's brief is an attempt to re-argue *Ex parte Muir*, 254 U. S. 522 and *The Pesaro*, 255 U. S. 216.

Concerning the argument of respondent under his Point II, it is sufficient to point out that this argument is almost identical with the argument made by the party-petitioner in *Ex parte Muir*, 254 U. S. 522. The respondent here relies on *The Roseric*, 254 Fed. 154. That case was cited (at p. 523 of 254 U. S.) by counsel for the losing party in *Ex parte Muir*, to sustain the identical proposition for which it is now cited. Respondent here also relies on *The Parlement Belge*, 5 P. D. 197. That case was cited by counsel for the British Ambassador in *Ex parte Muir*, 254 U. S. at p. 525. Counsel here also relies on *The Adriatic*, 253 Fed. 489; it was relied upon by the losing party in *Ex parte Muir* (254 U. S. 523). So also with *The Maipo*, 252 Fed. 627, cited by the losing party in *Ex parte Muir*, at 254 U. S. p. 523. As to the passage quoted from the opinion of the Circuit Court of Appeals in *The Carlo Poma*, 259 Fed. 369, respondent's brief at page 21, that case was reversed by this Court (255 U. S. 219). It is true that the ground of the reversal was that the Circuit Court of Appeals had no jurisdiction, but this Court in the first sentence of the opinion stated that the case was much like that of *The Pesaro*, 255 U. S. 216. On examination of *The Pesaro*, at pages 218 and 219, we find that this Court reaches diametrically the opposite conclusion from that stated by the Circuit Court of Appeals in the passage quoted in respondent's brief from *The Carlo Poma*, 259 Fed. 369.

The hypothetical cases discussed under Respondent's Point III do not exist here.

Under Point III, respondent sets up two hypothetical cases, neither of which exists here. As we have shown above, the

Treaty has nothing to do with a suit between an owner and his crew. In our principal brief we showed that this is not a suit brought to question the right of the Government of Spain to the possession of the "Navemar". The Government of Spain was not a party-respondent. The only parties-respondents were the five members of the crew. No representative of the Government of Spain was in possession of the vessel, and, as said in *Ex parte Muir,* 254 U. S. 522, at page 532:

> "*Prima facie* the District Court had jurisdiction of the suit and the vessel, *The Belgenland,* 114 U. S. 355, 368-369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion."

The English authorities cited at the bottom of page 25 of the brief are not in point, first, because, as pointed out by Judge Ward in *The Carlo Poma,* 259 Fed. 369, the English law varies from our own, and secondly, because in the recent case of *The Cristina,* 59 Lloyds List Law Reports, at page 33, it appears that "actual possession" of a vessel by a foreign government must be shown to defeat jurisdiction. In that case it was shown that after a new master was appointed for the "Cristina", that master went on board and remained in possession. In addition, since that time the Spanish Government paid the wages of the master and crew of the "Cristina". In 59 Lloyd's List Law Reports, at page 47, where the judgments of the Court of Appeal are printed, it appears, at page 48, that at the time the Spanish Consul took possession, the Captain appointed by the owners was not on board, and the new Captain appointed by the Consul was in charge of the vessel and held the vessel, and this was the state of facts at the time the suit for possession was brought. Both Lord Justice Greer and Lord Justice Scott made it clear in their judgments that this actual possession by the Spanish Government constituted the ground for denying jurisdiction. Obviously this must be so, as otherwise it is impossible to reconcile the case with the decision of the English court in the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, cited in our main brief. If the law were otherwise, a scientist seeking refuge here, might

have his property seized by virtue of a decree of confiscation issued by a foreign government whose jurisdiction he had fled, and might be without a remedy to recover his property thus unlawfully seized. Respondent seeks to draw a distinction between suits for damages and a suit for possession. We are unable to perceive any ground for such a distinction, especially when the vessel was held by employees of the petitioner—(see our principal brief at pp. 31 and 32), and when such employees received their pay from this petitioner, they are estopped to deny that their possession was for any other person than their employer, the petitioner here. *The Jupiter No. 3* (1927), P. 122, at page 135; *The Yarkand*, 120 Fed. 887, 891 (C. C. A. 5).

Point IV of respondent's brief is also an attempted reargument of *Ex parte Muir*, 254 U. S. 522 and *The Pesaro*, 255 U. S. 216, and an attempted abandonment of the concession that at most respondent's possession was a constructive possession.

In Point IV of his brief, respondent again bases his argument on actual possession of the "Navemar" by the Republic of Spain before the vessel arrived in New York, notwithstanding the fact that he had conceded in the court below that the Republic of Spain had "at most only a constructive possession" (R. 172). The argument under this point rests upon the assumption that the allegations of the Ambassador's suggestion are conclusive. We have fully dealt with this argument under Part I of our principal brief. The argument has no validity since the decisions of this Court in *Ex parte Muir*, 254 U. S. 522 and in *The Pesaro*, 255 U. S. 216. As we have stated above, the quotation from the manifest, at page 30 of respondent's brief, relied on to establish ownership, is incomplete and therefore misleading.

Respondent's Point V is merely a reiteration that the allegations of the Ambassador are conclusive.

The argument under Point V of respondent's brief was anticipated in our principal brief, and is merely a reitera-

tion of the contention that the allegations of the Ambassador in his suggestion are conclusive. In his discussion, however, respondent has gone outside of the record in describing what occurred in the *Robins Dry Dock* case. The record here merely shows that the Marshal attached the "Navemar" on the fifth day of December, 1936, and on that day gave "due notice to all persons claiming the same that this Court will, on the 16th day of Dec. inst., at 10.30 A. M. * * * proceed to the trial and condemnation thereof, should no claim be interposed for the same" (R. 247). It was conceded in the Circuit Court of Appeals that the S. S. "Navemar" was under arrest by a process in a libel of the Robins Dry Dock & Repair Company and had been taken into the custody of the Court under such process at the time of the possessory libel herein filed (R. 250). Respondent does not, and cannot, meet the argument contained in our principal brief at pages 22-24, that the "Navemar" could not be in the possession of the Republic of Spain at the time this suit was brought on December 7, 1936, because since December 5, 1936, the vessel was in the possession of the Marshal of the District Court (R. 247). The arrest, therefore, in the present case did not, and could not, dislodge the possession of the Ambassador, because the possession was in the Marshal.

In Point VI respondent in effect concedes that unless the allegations of the Ambassador are conclusive, the Circuit Court of Appeals was without power on the record presented to it to dismiss the libel.

The argument under Point VI of respondent's brief ignores the uncontested fact that the application of the Ambassador was to open up a final decree and to permit the Ambassador to appear as a party-claimant in the cause. It ignores also the plain language of this Court in *The Pesaro*, 255 U. S. 216, at pp. 218, 219, that when a suggestion of a foreign Ambassador does not come "through any official channel of the United States", then the Ambassador to assert any right on the part of his government, must become a suitor, and establish as a suitor whatever right his government may have.

When the United States Government declined to vouch for the statement of the Ambassador by placing the allegation of the Ambassador before the Court "through any official channel of the United States", and when a final decree was entered in the cause, the case was at an end unless the Court should open up the case for a rehearing. This the lower court refused to do, finding that on the showings made by the respondent on the application to reopen or vacate the final decree and defend as respondent, no meritorious defense was set forth. And it was this refusal only that the Circuit Court of Appeals reviewed on appeal, having dismissed the appeal as to the final decree. How, on an application to open up a final decree so that evidence may be offered to sustain a claim of a proprietary inferest in a ship, or any other chattel, a case may be dismissed without admission of any evidence or permitting the party in whose favor the decree was entered, to offer any evidence in rebuttal of any evidence offered by the intervenor, is not made clear. We have searched the books in vain to find that any case, wherein a final decree has been entered, has been dismissed merely on the application of a third party to set aside the final decree so that it might intervene in the suit. At the bottom of page 42 and at the top of page 43, respondent virtually concedes that this action of the Court could only be sustained on the principle that "the District Court would have been bound to accept the allegations of the suggestion as conclusive and could not have inquired by contentious (*sic*) testimony whether the representations were correct or not". By this language he concedes that if we are right in Part I of our principal brief, the action of the Circuit Court of Appeals cannot be sustained (see Part I of our principal brief, pp. 8-20).

With the question of immunity out of the way, nothing remains of respondent's case, for, as was pointed out in *The Jupiter No. 3* (1927), P. 122, the decree of confiscation was without effect as to property like this vessel beyond the territorial jurisdiction of the Republic of Spain. And particularly is that true here, because to enforce that decree here

would involve enforcing a penal statute of a foreign power, which our courts will not do (see our principal brief, pp. 25-27). And to make it worse, would involve enforcing such a decree against an alien friend (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481), long a resident of this country.

The reference in Appendix C to the alleged violation of a restraining order by us deserves a word. Neither the respondent nor the courts below have ever mentioned the matter before. Why, when a person is sued for wages by his employees, he should be prevented from paying them, is not made clear. But even assuming that an admiralty court had issued such an order, it would have been invalid because admiralty courts, except in cases of limitation of liability, have no authority to issue injunctions. *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454, at pages 457, 458.

CONCLUSION.

The order of the Circuit Court of Appeals should be reversed and the final decree of the District Court should be affirmed, with costs.

Respectfully submitted,

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D. ROGER ENGLAR,
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